IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

STEVEN PAUL TURNER, Petitioner, v. HON. EDGAR ACUNA, Judge of the Superior Court of the State of Arizona, in and for the County of Pima, Respondent, and THE STATE OF ARIZONA, Real Party in Interest.	)	2 CA-SA 2007-0027 DEPARTMENT B DECISION ORDER

SPECIAL ACTION PROCEEDING

Pima County Cause No. CR20061123

JURISDICTION ACCEPTED; RELIEF GRANTED

David Lipartito, P.C.
By David Lipartito
Tucson
Attorney for Petitioner

Barbara LaWall, Pima County Attorney
By Jacob R. Lines
Tucson
Attorneys for Real Party in Interest

¶1 In this special action, petitioner Steven Paul Turner, the defendant in the underlying criminal action, challenges the respondent judge's order denying Turner's motion to suppress evidence seized during a search of his car. Generally, an appellate court will not accept special action jurisdiction in order to review the denial of a defendant's motion to suppress evidence. *See Rodriguez v. Arrellano*, 194 Ariz. 211, ¶ 4, 979 P.2d 539, 541 (App. 1999). But because the error here is clear as a matter of law in light of our supreme court's decision in *State v. Gant* (*Gant II*), ___ Ariz. ___, 162 P.3d 640 (2007), no purpose would be served by permitting the state to proceed with the prosecution of this case and introduce evidence that was unlawfully seized from Turner's car. *See Washington v. Superior Ct.*, 180 Ariz. 91, 93, 881 P.2d 1196, 1198 (App. 1994). We therefore accept jurisdiction of this special action and for the reasons stated below, we grant relief. *See generally* Ariz. R. P. Spec. Actions 1 and 3, 17B A.R.S.

¶2 In his petition, Turner contends the respondent judge erred when he concluded the state had conducted a valid search of his car incident to arrest. Specifically, Turner maintains the respondent's conclusion cannot be harmonized with the opinion issued by this court in *State v. Gant* (*Gant I*), 213 Ariz. 446, 143 P.3d 379 (App. 2006). Because our supreme court had granted review of that case, we withheld ruling on this petition to await its decision. The supreme court's reasoning and holding is virtually indistinguishable from our own. *Gant II*, ___ Ariz. ___, 162 P.3d 640, *vacating Gant I*, 213 Ariz. 446, 143 P.3d 379.

¶3 Therein, the supreme court framed the issue in *Gant II* as follows:

> This case requires us to determine whether the search incident to arrest exception to the Fourth Amendment's warrant requirement permits the warrantless search of an arrestee's car when the scene is secure and the arrestee is handcuffed, seated in the back of a patrol car, and under the supervision of a police officer.

___ Ariz. ___, ¶ 1, 162 P.3d at 640. The court held, "in such circumstances, a warrantless search is not justified." *Id*.

¶4 In the instant case, the parties do not dispute the underlying facts relevant to the validity of the search of Turner's car, conducted incident to his arrest. Turner was in the back of a locked patrol car in handcuffs, supervised by an officer as other officers conducted the search. Moreover, Officer Kerlin conceded that Turner posed no risk of reaching his car at that point in time. Thus, the facts existing at the time the officers conducted the search of Turner's car cannot meaningfully be distinguished from the operative facts pivotal to the holding in *Gant II*. And, as the supreme court found in *Gant II*, neither of the two justifications for a warrantless search incident to arrest as set forth in *Chimel v. California*, 395 U.S. 752, 89 S. Ct. 2034 (1969), existed: "the need to protect officers and preserve evidence." *Gant II*, ___ Ariz. ___, ¶¶ 9, 13, 162 P.3d at 642, 643. Accordingly, the respondent judge erred when he found the officers had validly searched Turner's car incident to his arrest.

¶5 The respondent judge also justified the search of Turner's car on the alternative ground that the evidence found in the car would have been "inevitably

discovered" during an inventory search.[1] But the state did not elicit testimony or present other witnesses suggesting that it would have impounded Turner's car and conducted an inventory of its contents in the absence of evidence supporting a felony arrest—evidence it secured only by unlawfully searching the vehicle incident to Turner's misdemeanor arrest.[2] In fact, Officer Kerlin acknowledged that the "policy and procedure" of his department does not require that he impound a suspect's vehicle in the context of a mere misdemeanor arrest. And, Kerlin conceded that he had no basis to arrest Kerlin for anything other than a misdemeanor until officers discovered evidence in the car pursuant to the improper search incident to Turner's arrest. The respondent judge had no factual basis to support his conclusion that the evidentiary contents of the car would have been inevitably discovered. *See State v. Davolt*, 207 Ariz. 191, ¶ 35, 84 P.3d 456, 469 (2004) (state bears burden of proving evidence would have been inevitably discovered by preponderance of evidence); *see also Gant II*, ___ Ariz. ___, ¶ 24, 162 P.3d at 646 (search cannot be justified on inventory grounds when officers had no intention of impounding car until it was first unlawfully searched).

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[1]The respondent judge stated at the end of the suppression hearing that the marijuana "would have been inevitably found . . . because there was a[n] inventory search of the vehicle, which is required based upon the arrest and the impounding of the car."

[2]Apart from cursorily suggesting we review and incorporate by reference its briefing in the trial court, the state has not addressed this alternative basis for the respondent judge's ruling.

¶6 For the foregoing reasons, we grant special action relief, reverse the respondent judge's order denying Turner's motion to suppress evidence seized during the search of his car, and remand for further proceedings consistent with this decision.

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PETER J. ECKERSTROM, Presiding Judge

Judges Espinosa and Brammer concurring.